UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: TEXACO, INC., *Debtor.*	Case No. 87-20142 *(rdd)* White Plains, New York May 28, 2010 10:40 a.m.

CORRECTED TRANSCRIPT OF TELEPHONE HEARING RE 87-20 142-ASH TEXACO, INC.; CASE CLOSED ON 03/05/2007 CHAPTER: 11 RE: DOC. 3869 - MOTION OF TEXACO INC. FOR ORDER (I) REOPENING TEXACOS CHAPTER 11 CASE, (II) ENFORCING CONFIRMATION ORDER DATED MARCH 23, 1988, (III) FINDING RESPONDENTS IN CIVIL CONTEMPT OF 11 U.S.C. §524(A)(2) AND CONFIRMATION ORDER, AND (IV) DIRECTING RESPONDENTS TO DISMISS THEIR DISCHARGED CLAIMS AGAINST TEXACO INC. IN THE LOUISIANA ACTIONS FILED BY MARTIN J. BIENENSTOCK ON BEHALF OF TEXACO, INC.
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

A P P E A R A N C E S :

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THE COURT: Do I have the parties on the phone on the Texaco matter?

MS. KELLEHER: Your Honor, it's Leslie Kelleher of Caplin & Drysdale for the respondents Kling Realty, et al.

MR. STEFFES: William Steffes, also on behalf -- Your Honor, good morning -- on behalf of the Kling respondent.

MR. BIENENSTOCK: Good morning, Your Honor. Martin Bienenstock, Phil Abelson and Henry Ricardo for Chevron.

THE COURT: Okay. I think that's -- those are the relevant parties. I want to thank the parties for their supplemental briefing, and, as I think my chambers informed you, I am prepared to rule at this point on Texaco's request for relief, which is to enforce the confirmation order and bar date order in this case and ultimately the discharge under Section 524(a) against the defendants or respondents in this case, who I will refer to as the “Kling parties,” although there are also the Walets involved, as well, and the other entities listed in the caption.

The Court has core jurisdiction over this adversary proceeding, which is a proceeding to enforce the Court's prior orders, as well as the discharge in the case, all of which gives rise to jurisdiction under both 28 U.S.C. 1334(a) and is -- makes this proceeding a core proceeding under section 157 -- 28 U.S.C. 157(b). See *In Re: Petrie Retail, Inc.* 304 F.3d. 223, 230 (2d. Cir 2002), and *In Re: Brooks Fashion Stores, Inc*. 124

B.R. 436 (Bankr. S.D.N.Y. 1991).

The parties have helpfully prepared a stipulation of facts for a hearing dated January 21, 2010. I pressed the parties at oral argument on this matter whether there were any materially disputed facts, and I think it's a fair summary to say that both Mr. Bienenstock and Mr. Lockwood stated that, to their knowledge, there weren't, but if something came up they would reserve their rights to assert if something is disputed.

Based on my review of the exhibits and the transcript of oral argument, as well as the briefing on this matter, I don't believe that for purposes of my decision today there are any material disputed facts, and the key facts are set forth in the stipulation as well as the underlying documents and, primarily, the parties' lease, which is Exhibit 12 in this matter.

By way of background, Texaco's motion arises out of two state court lawsuits filed by the respondents herein, the Kling parties, who had leased land pursuant to an oil and gas lease to Texaco in 1946. That lease is attached, again, as Exhibit 12 to one of the exhibits in the case. The parties have through legal action -- through assignments or changes in name – changed, but the parties here are the successors to those parties.

One of the lawsuits, Kling-1, *Kling Realty Company, Inc. and Walet Planting Company v. Chevron USA, Inc.* (Chevron

being the successor to Texaco), case number 08-30043 is no longer an issue, given the final and non-appealable judgment that that lawsuit is barred by prescription, or the statute of limitations under Louisiana law.

In the second lawsuit, however, *Kling Realty Company, Inc. v. Chevron USA*, case number 110623, the Kling parties continue to seek relief on both contract and tort claims (or delict claims, in Louisiana parlance), arising out of -- that were connected to Texaco's oil and gas production under the 1946 lease. The respondents assert claims relating to alleged damage to or for restoration of the portion of the acreage that was subject to the 1946 lease referred to as Section 27; and that's found at paragraph 6 of the stipulation of facts.

The lease provided that -- and this is in paragraph 2 of the lease -- "Subject to the other provisions herein contained, this lease shall remain in force for up to five years from this date and as long thereafter as either oil or gas is produced from said land hereunder."

The parties acknowledge that the obligations under the lease did not terminate until after the commencement of the Chapter 11 case -- Texaco having filed for relief under Chapter 11 in this Court on April 12, 1987, and the final release under the lease not having been executed and recorded until November 12, 1987. Much of the respondents' argument is based upon that fact.

There are other relevant provisions of the lease, however. First, the lease provides in paragraph 8 that the lessee, just to quote, "may at any time and from time to time during the lease, execute and deliver to lessor or place of record a release covering all or any portion or portions of the leased premises as to all or any specified mineral or minerals, and thereupon shall be relieved of all obligations as to the acreage surrendered or as to the acreage as to only the particular mineral or minerals specified, as the case may be."

Finally, the 1946 lease also provides, at paragraph 10, that "the lessee shall without undue delay pay and reimburse to the lessor any and all damages in full to lessor's lands, crops, roads, and property caused by its operations either of drilling wells or laying pipelines or in maintaining, operating and also in constructing or using buildings, roads and other works on the said land as permitted herein."

Consistent with paragraph 8 of the lease, which I previously quoted in relevant part, Texaco, over the course of its tenancy, used the right to release a portion of the leased property or leased acreage a number of times. It executed a release as to Section 21 of the leased property in 1974; in June -- on June 6, 1986, as recorded on June 13, 1986, it also released a portion of the acreage on Section 27. It also did so in 1984. See stipulation at paragraphs 7 and 10.

In each case, Texaco consistent, again, with paragraph

8, reserved and retained certain rights of way, easements, servitudes and privileges for the operation of pipelines and other facilities located over, upon and across Section 27, which were necessary and convenient to lessee's continued operations on the land retained under the 1946 lease.

With respect to the June 1986 release, this pertained to an operating well in Section 26, Well Number 14. The operation of or production, excuse me, on Section 27 is agreed to have terminated pre-bankruptcy, and the parties have agreed that the last well on Section 27 was plugged and abandoned on November 3, 1986 -- again, before Texaco commenced this Chapter 11 case.

The alleged harm or damage to the respondents' property is agreed to have been to property on -- located on Section 27, and it appears to me that all of that damage occurred, or that the contamination or other causation of such damage occurred, before the commencement of Texaco's Chapter 11 case.

However, the parties have also stipulated that after the petition date Texaco continued to "access and perform work, including pit closures, upon certain property once subject to the 1946 lease, including Section 27," and that this activity continued beyond the date that Texaco's plan was confirmed, March 23, 1988. Stipulation at paragraph 31.

The dispute in this case hinges upon whether, first,

the Kling parties, or the respondents, are bound by the bar date order entered by this Court during the course of Texaco's Chapter 11 case, establishing a March 15, 1988 bar date, and, then, whether the failure of the respondents to file a claim means that their claims in the Kling-2 action are now barred and discharged by the bar date order and the confirmation order, which was entered on March 23, 1988.

To answer that question, the Court has to navigate its way through a number of issues which, given the expertise and creativity of the parties, somewhat resemble a law school exam; but, ultimately, the determination is relatively clear cut on each of the issues.

Before turning to those issues, the Court should note one other relevant date, which is October 9, 1991 -- which is when the bankruptcy case, the Texaco bankruptcy case, was closed, as well as note that although there was some uncertainty about this in my mind going into the oral argument, it has now been conceded at oral argument that each of the respondents, or the Kling parties, received actual notice of the bar date, and, of course, that they did not file a claim that asserted any claim, let alone the claims set forth in Kling-2.

The first set of issues raised by the respondents is whether, in fact, the respondents received appropriate notice of the bar date and also whether, even if they did so receive -- did receive such notice, they should be relieved of the bar date

order under various equitable theories. The respondents have also requested that if the answer to those questions is that they are bound by the bar date order, they be permitted to file a late proof of claim under Bankruptcy Rule 9006. I will address that latter point at the end of this ruling.

As far as the former point, the Court has previously upheld the bar date order, as applied to creditors in a similar position to the respondents here, in this case. And I believe that those rulings are equally applicable here, notwithstanding the argument made by the respondents, as would have been applicable in the other Texaco rulings that were decided, that this was a solvent debtor and that the bar date order and the bar date itself, therefore, didn't play all of the traditional roles that a bar date order would play in most Chapter 11 cases, that involve insolvent debtors, and that the bar date itself was established as a date only relatively shortly before confirmation of Texaco's Chapter 11 plan.

None of those facts, I believe, negates the fact of the bar date order, which was granted and entered by the Court to set a deadline for the filing of general unsecured claims in the case, and which I believe served an important purpose in the case enabling parties in interest to evaluate the claims against the estate prior to the confirmation hearing and entry of the confirmation order. That is, it was not an empty procedural gambit. See, for example, *In re Calpine, Inc.* 2007 U.S. Dist.

Lexis 86514, pages 14 through 15 (S.D.N.Y., Nov. 21, 2007), and *First Fidelity Bank, N.A. v. Hooker Investments, Inc.* 937 F.2d. 823, 840 (2d. Cir. 1991).

The respondents further argue that in light of Texaco's stated policy that it intended to treat its lessors and leases as if the bankruptcy hadn't happened, they should be excused from having to be bound by the order, notwithstanding the order's terms, or, as a wrinkle on the foregoing, that the notice of the bar date approved by the Court needed to identify their particular claims and their obligation to file a claim more explicitly than it did.

I believe, having reviewed the bar date notice and bar date order, that the order sufficiently set forth notice of the requirement to file a proof of claim for the types of claims that are asserted in the Kling-2 action, and that additional notice was not required.

I say that notwithstanding Texaco's communications to lessors, because I believe that those communications should not be read as obviating the need to file a claim, particularly in respect of obligations that, under paragraphs 8 and 10 of the 1946 lease, would have been triggered pre-bankruptcy by either the release of specific acreage or, under paragraph 10, a duty to cure damages without undue delay.

The respondents rely heavily upon *In Re Texaco, Inc.* 254 536 -- I'm sorry, 254 B.R. 536 (Bankr. S.D.N.Y. 2000), also

referred to as the *LaFourche* case, L-a F-o-u-r-c-h-e. However, I believe that that case in fact supports Texaco's position here, in that that case, in contrast to the other Texaco decisions enforcing the bar date that I am about to cite, is addressed to a different circumstance, which is the so-called ride-through of unexpired leases, where there was no express termination either by a clear rejection notice or under section 365 of the Bankruptcy Code or a termination of the lease or expiration of the lease by its own terms.

In addition to that distinguishing factor which Judge Hardin I believe makes clear in the *LaFourche* decision, the applicability of the bar date to claims arising prepetition in this case has been enforced a number of times, including in *In Re Texaco, Inc.* 218 B.R. 1 (Bankr. S.D.N.Y. 1998), and *In Re Texaco, Inc.* 182 B.R. 937 (Bankr. S.D.N.Y. 1995), which cases I believe sufficiently dealt with the arguments made by the respondents here with regard to the confusion they say they had as to whether their claim was, in fact, a pre-bankruptcy claim covered by the bar date order or a post-bankruptcy claim which would ride through the bankruptcy case instead. See also, in respect of the notice issues, *Jones v. Chemtron Corp.* 212 F.3d 199 (3d. Cir. 2000).

The Kling parties also argue that Texaco should be estopped from relying on the bar date under the doctrine of laches, given that the Kling-2 case, which was filed on May 15,

2009 -- I am sorry, given that Texaco appears to have first raised the bar date issue and the discharge issue in Kling-2 on May 15, 2009, approximately 20 months after the commencement of Kling-2, and that in the intervening period the parties -- the Kling parties -- incurred thousands of dollars of fees and costs in the preliminary litigation of Kling-2.

They also note that when the answer was due in Kling-2, Louisiana law required that a discharge in bankruptcy be raised as an affirmative defense. See Louisiana Rules of Civil Procedure Annot. Article 1005 (2005). Notwithstanding that fact, however, I believe that neither waiver nor laches apply here, given, primarily, the fact that under the Bankruptcy Code the discharge, which in a Chapter 11 case benefits not only the debtor but the debtor's creditors (and, in a solvent case the debtor's shareholders) cannot be waived by conduct or even an agreement, without proper approval under section 524 of the Bankruptcy Code. See *In re Gurrola,* 328 B.R. 158 (9th Cir. BAP 2005). I believe the same analysis would apply to laches, as has been so held at 323 B.R. 802 (10th Cir. BAP 2005), in *In Re Pritner*.

In any event, laches is an equitable doctrine which applies when a party unreasonably delays in asserting a right which, taken together with a lapse of time and other circumstances causes prejudice to an adverse party and operates as a bar in a court of equity. *In Re DeArakie*, D-e A-r-a-k-i-e,

199 B.R. 821, 827 (Bankr. S.D.N.Y. 1996). Here, notwithstanding the costs that the Kling parties have incurred between the date that they commenced Kling-2 and the date that Texaco sought to enforce this Court's orders and the discharge, two facts cut against the application of laches, even if it is permitted to apply notwithstanding section 524.

First, in their complaint, the Kling parties asserted they were not seeking relief in violation of the discharge. Second, as is evident by the development, even during oral argument, of the matter before the Court, the nature of and theory behind the Kling parties' claims has developed over time. Therefore, I believe that it is not inequitable to permit Texaco to have asserted the discharge and the bar date when it did, after it became clear that the type of claim -- at least one of the types of claims -- asserted by the respondents would clearly be within the ambit of the bar date order and the discharge.

I also do not believe that the doctrine of judicial estoppel would apply here since the plaintiff here, Texaco, has not both asserted and prevailed on a contrary position in another matter than the position it is asserting here with respect to the applicability of the bar date order and the discharge. See *In Re Perry H. Koplik & Sons, Inc.* 357 B.R. 231 (Bankr. S.D.N.Y. 2006), and *In Re I. Appel Corp.* 300 B.R. 564 (Bankr. S.D.N.Y. 2003), as well as *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

Ultimately, the doctrine of judicial estoppel is intended to prevent a party from "playing fast and loose with the courts." *In Re Galerie Des Monnaies of Geneva, Ltd.*, 62 B.R. 224, 226 (S.D.N.Y. 1986), and *In Re Perry H. Koplik & Sons, Inc.* 357 B.R. 231, 245 (Bankr. S.D.N.Y. 2006). I do not believe that that is the case here with regard to the applicability of the bar date order and the discharge.

Therefore, I turn to the respondents' argument that the claims they are asserting are not covered by the bar date order and, therefore, would not be barred or discharged at this time.

The claims that are being asserted by the respondents here fall, according to the respondents, into two categories: prepetition claims and postpetition claims. By its terms, the plan would pay all administrative claims, that is postpetition claims, in full in the ordinary course.

And they will be: to the extent that it is asserted by the respondents that they have administrative claims, those claims will be paid as dealt with in a moment. However, it is clear to me that to the extent that the claims in Kling-2 arise prepetition, those claims would, in fact, be barred by the bar date order and discharged.

Based upon the facts in this case, it is clear to me that claims arising under either paragraph 8 or paragraph 10 of the 1946 lease would be, in fact, prepetition claims.

First, the lease itself is obviously a prepetition agreement. Secondly, the conduct giving rise to the conditions that require cleanup occurred prepetition. And, thirdly, the obligation itself (although this is not required for making a claim a prepetition claim) appears to have become actual prepetition with the release of the production property prepetition and the closing and cease -- cessation of the production prepetition in Section 27, which as I understand it is the basis for the claim in Kling-2.

As I just noted, that latter fact, i.e., the fact that the claim ceased to be contingent prepetition, is not a requirement for a claim to be a prepetition claim given the broad definition of “claim” in section 101(5) of the Bankruptcy Code. As noted by the Second Circuit, "A claim arises for purposes of bankruptcy when 'the relationship between the debtor and creditor contained all of the elements necessary to give rise to a legal obligation under the relevant non-bankruptcy law.'" In re Duplan Corporation, 212 F.3d 144, 151 (2d. Cir. 2000), quoting *In Re Chateaugay Corp.*, 53 F.3d 478, 497 (2d. Cir.), cert. denied 516 U.S. 913 (2000) -- I'm sorry, (1995). See also *In Re: Manville Forest Products Corp.* 209 F.3d 125 (2d. Cir. 2000), and *In Re: Texaco, Inc.* 218 B.R. 1 (Bankr. S.D.N.Y. 1990).

I believe that the respondents pretty much acknowledged this hurdle, at least at oral argument, when the

focus of their opposition to Texaco's request for relief here turned to asserting, or emphasized the assertion, that the claim or claims as asserted in the Kling-2 case are in fact administrative claims under section 503(b)(1) of the Bankruptcy Code and, therefore, wouldn't be covered by the bar date order in any event but, rather, would be governed by Texaco's Chapter 11 plan, which required that such claims be paid in the ordinary course in full.

Section 503(b)(1) of the Bankruptcy Code provides a priority for the "actual necessary costs and expenses of preserving the estate, including wages, salaries or commission for services rendered after the commencement of the case." Under section 507(a)(1), Those expenses are accorded a first priority. That priority is based on the premise that the operation of the business by the debtor in possession benefits prepetition creditors. Therefore, any claims that result from the operation are entitled to payment prior to payment to creditors for whose benefit the continued operation of the business was allowed. *In re Enron Corp.* 300 B.R. 201, 207 (Bankr. S.D.N.Y. 2003). As noted by the *Enron* court, the focus of this section is to prevent unjust enrichment of the estate, not to compensate the creditor for its loss. Id. at -- again at 207.

It is clear that in evaluating whether a creditor has carried its burden to show that it has an administrative claim,

the court should narrowly construe the right to such a claim. That is because every dollar paid in full to an administrative creditor reduces the amount of so-called tiny bankruptcy dollars paid to general unsecured creditors. See *Howard Delivery Service, Inc. v. Zurich American Insurance Co.*, 126 S. Ct. 2105 (2006), and *In Re: Bethlehem Steel Corp.*, 479 F.3d 167 172 (2d. Cir. 2007).

In light of the forgoing, the Second Circuit has adopted a definition that is difficult to meet. An expense is administrative under section 503(b)(1) only if it arises out of a transaction between the creditor and the trustee or debtor in possession, and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor in possession in the operation of the business. *In Re: Bethlehem Steel*, 479 F.3d at 172, quoting *Trustees of Amalgamated Insurance Fund v. McFarlin's Inc.*, 789 F.2d 98, 101 (2d. Cir. 1986). That is the case with respect to all matters other than postpetition tort matters. Before turning to those types of administrative claims, it should be noted, therefore, that a debt is not entitled to an administrative priority simply because the right to payment arises after the debtor in possession begins managing the estate but, rather, depends upon the date of the consideration supporting the claimant's right to receive it. McFarlin's, 789 F.2d at 101.

In addition, the benefit will set the measure of the claim, since it's clear from the prior quote that the claim will be allowed only to the extent that the consideration supporting the claimant's right to payment was both supplied and beneficial to the debtor in possession. Also, the benefit must not be speculative but, instead, must have a present value at the time it was conferred, even if, thereafter, according to the Second Circuit, it had turned to dust, in light of the ultimate failure to rehabilitate or sell the business. See *Nostas Associates v. Costich* (*In re Klein Sleep Products, Inc.*), 78 F.3d 18, 26 (2d. Cir. 1996), and *In Re: Refco, Inc.* 2008 WL 140956 at *7-8 (S.D.N.Y. January 14, 2008), aff'd, 321 Fed. Appx. 12 (2d. Cir. 2009).

Given the forgoing, it appears to me that the respondents' contract claims in Kling-2 would not constitute administrative claims: not only are they premised on a prepetition contract, but they are also premised upon activity giving rise to a cleanup obligation that occurred prepetition.

The respondents counter by saying that the debtor maintained an interest in Section 27 during the postpetition period with respect to rights of way, pipelines and easements that related to Section 26 and the well for which some income was produced thereon, and that that section -- that is Section 26 -- was not released until the postpetition period. However, they have not asserted any cleanup obligation that was caused by

conduct of the debtor on Section 27 relating to the postpetition period.

Moreover, it appears clear to me that the debtor's obligation under the parties' contract to the extent that the contract continued during the postpetition period arose prepetition. Again I return to Section -- paragraph 8, excuse me, and paragraph 10 of the lease. Paragraph 8 of the lease provides that the lessee shall be relieved of all obligations as to the acreage surrendered or as to the acreage -- as to all of the particular minerals specified, as the case may be. The acreage surrendered prepetition as I understand it, is the acreage upon which the cleanup obligation is asserted.

More importantly, the lease provides an obligation to clean up that modifies paragraph 8, which is found in paragraph 10; but again I believe that obligation was triggered by its plain terms when the property was surrendered. That section provides "the lessee shall without undue delay pay and reimburse the lessor any and all damages in full to the lessor's lands, crops, roads and property caused by its operations."

The term "undue delay" does not appear to me to be a term of art. And again without there being an assertion that the lessee was somehow prohibited from paying and reimbursing to the lessor any and all damages upon its release of the land in Section 27, it appears to me that the parties agreed by paragraph 10 of the lease that that is when Texaco's obligation

to pay the respondents their damages caused by its operations would have arisen, at the latest.

It is asserted by the respondents that there is a separate obligation under Louisiana law that arises only upon the termination of the lease, i.e., the full lease as opposed to release of the property under a lease, to restore the property. And I believe that is the case when the lease itself has not dealt with, by the agreement of the parties, the parties' rights in respect of damages caused by one to the other.

Louisiana, not surprisingly, recognizes freedom of contract. Their agreement is the law as between the parties, *Corbello v. Iowa Production* 857 So.2d. 686, 693 (La. 2003). And not surprisingly also, the purpose of contract interpretation is to determine the common intent of the parties, and the meaning and intent of the parties to a written instrument should be determined within the four corners of the document and its terms should not be explained or contradicted by extrinsic evidence. *Id.*

When a contract is subject to interpretation of the four corners of the instrument without the necessity of extrinsic evidence that interpretation is a matter of law, and when the words of the contract are clear and explicit and lead to no uncertain consequences, no further interpretation need be made into the party's intent. Thus, again, the parties are free to contract for any object that is lawful, possible and

determined or determinable.

Here, I believe, that's just what the parties did. The cases cited by the respondents for the proposition that a remediation obligation -- or a restoration obligation, excuse me, arises only upon termination of the contract, deal with situations where the parties did not specify a separate obligation and therefore were dealing with, simply, issues under Louisiana mineral statute and civil statute law.

I believe this is clearly or most clearly set forth in the back and forth between the dissenters and the court in *In Re: Terrebonne Parish School Board v. Castex Energy Inc.* 893 So.2d. 789 (La. 2005), where the language that appears in the lease did not appear but the Court was, instead, dealing with implied obligations under Louisiana law. That was also the fact pattern in *Corbello v. Iowa Production*, 857 So. 686 (La. 2003).

So, even under the broadest approach, which is the approach that the respondents take, to finding an administrative claim, wherever there is some postpetition benefit because of a continued relationship between the parties, I don't believe that the amount of the claim, or, more importantly, the underlying basis for the claim, which is prepetition activity, under the parties' agreement would support the allowance of an administrative claim here.

Moreover, I believe there is also considerable merit to the view that, with the release of the property where the

cleanup needs to be done, there was no ongoing postpetition cleanup obligation simply because other property was retained. I believe this is made clear in a series of cases that deal with tenants' cleanup obligations after the rejection or termination of a lease, where the courts have uniformly held that such cleanup obligations do not give rise to an administrative claim even where, in certain instances, the debtor chose not to reject the lease and, therefore, end the relationship until a considerable time postpetition. See *In Re: Ames Department Stores, Inc.*, 306 B.R. 43 (Bankr. SDNY 2004), which relied upon *In Re: Unidigital, Inc.*, 262 B.R. 283 (Bankr. D Del. 2001), and *In Re: National Refractories and Minerals Corp.*, 297 B.R. 614 (Bankr. N.D. Cal. 2003).

In response to those types of cases, as well as *Bethlehem Steel* and *McFarlin's*, the respondents essentially rely upon a trilogy of Third Circuit -- I'm sorry, of Second Circuit cases that provided administrative claim status for severance claims for employees with severance agreements who were terminated postpetition, including and most importantly, *In Re: Straus Duparquet*, 386 F.2d 649 (2d Cir. 1967). The respondents are correct that the Second Circuit has not overturned those precedents. However, it has severely narrowed them in the *Bethlehem Steel* case that I previously cited, in which the Court said "A payment may be entitled a priority under *Straus Duparquet* even if it operates differently from the payment at

issue there, if it provides a new benefit at termination that employees would not otherwise receive. The key inquiry is whether the payment is a new benefit earned at termination or instead an acceleration of benefits to which the employee was previously entitled. The former is an administrative expense of the debtor-in-possession, while the latter is not."

As I previously noted, the right here asserted by the respondents arose pre-bankruptcy, under the lease and in particular at paragraphs 8 and 10, under these facts. Those paragraphs modified the common law -- or not common law, the code law provisions as interpreted by the Louisiana courts -- that, in the absence of an applicable contractual provision, give the lessor a restoration right upon only the termination in full of the lease.

Obviously, in the normal case such a common law or code law provision would operate to the detriment of lessors since a lessee could drag out its obligation under a long term lease until all sections would be terminated. Here, where the parties anticipated the termination of individual sections or acreage within individual sections well before the termination of the lease, it's entirely logical that they would contract to accelerate the obligation of the lessee to pay for damages caused by its operations. And therefore, again, consistent with all of the administrative claim case law that I've cited, that obligation being accelerated by the parties arose postpetition -

- I'm sorry, prepetition, and, therefore, would be merely a general unsecured claim.

I have reviewed the one other case cited by the respondents on this point, which is *In Re: Penn Traffic Company*, 524 F.3d. 373 (2d. Cir. 2008), and, frankly, I simply don't see its relevance given that the termination in that case was by the non-debtor party and the case did not really deal with administrative claims but, rather, with what was an executory contract and what isn't an executory contract.

That leaves two remaining issues. As I noted, the requirements for the allowability of an administrative claim under *Bethlehem Steel* would bar a claim where the parties' relationship is contractual. There's a slightly different approach where the parties' relationship is based on a tort claim, following *Reading Co. v. Brown*, 391 US 471 (1968). It's well established that "damages resulting from the negligence of a receiver" [you could substitute in here a debtor-in-possession] "during the postpetition period give rise to administrative expense claims." Id. at 485. In doing so, the Court held, "an involuntary creditor of the estate suffers grave financial injury as a result of the negligence of the bankrupt's estate and therefore it is natural and just to afford such claims priority and distribution even though such claims do not arise from transactions that were necessary to preserve or rehabilitate the estate." Id. at pages 477 and 482.

I believe, however, that the mere label of a tort claim, as placed on the alternative claim asserted in the Kling-2 action, does not by itself give rise to an administrative claim here under *Reading Co. v. Brown* and the case law that has followed it. The tort claim that is asserted here is a "delict" claim, under the Louisiana parlance, that is premised upon the fault incurred by Texaco in breaching its contract. See Louisiana Code -- I'm sorry, Civil Code Annotated, Article 2315(a), and *Cooper v. Louisiana Department of Public Works*, 870 So.2d. 315, 332 (La. A.D. 3d Cir. 2004).

Here, in that sense, and contrary to the logic of *Reading Co. v. Brown*, the respondents are not involuntary creditors. Their tort rights are premised upon their contractual relationship and the breach of that relationship or the asserted breach of that relationship by Texaco. Since that breach occurred, as I have already found -- if it occurred -- prepetition, I do not believe that the holding of *Reading Co. v. Brown* would be applicable here.

I also note that the respondents have been careful to state, as they did at oral argument, that they're not asserting a right based upon a breach of applicable regulations or statute that would require Texaco to act at the direction of the Louisiana environmental regulatory authorities, and they're not asserting that Texaco placed or caused environmental contamination on the leased property postpetition. Rather, the

administrative claim is premised upon the continuing lessor/lessee relationship with respect to property that apparently was not contaminated and does not give rise to a cleanup obligation or a damage claim, but that occurred after the commencement of Texaco's Chapter 11 case. That relationship, as I have said, however, would not give rise to a postpetition administrative expense claim.

Finally, the claimants -- I'm sorry, the respondents, contend that Texaco had an obligation with regard to all of Section 27 under section 365(d)(3) of the Bankruptcy Code because that -- the lease in respect of that section did not completely get released in the prepetition releases. If that were so, then Texaco would have an administrative claim against it under that section, which provides that "The trustee shall timely perform all obligations of the debtor [with irrelevant exceptions] arising from and after the order for relief under any expired lease of non-residential real property until such lease is assumed or rejected."

Texaco contends that this provision does not apply to a Louisiana oil and gas lease based upon case law, including a case involving Texaco, but primarily upon *In Re: Hamm Consulting Company/William Lagnion MJV*, 143 B.R. 71 (Bankr. W.D. La. 1992), which construed, among other things, a decision by the District Court for the Middle District of Louisiana in *Texaco, Inc. v. Louisiana Land and Exploration Co.,* 136 B.R. 658 (M.D. La.

1992). I believe that those decisions are persuasive and that this type of real property relationship would not constitute a non-residential real property lease for purposes of section 362(d)(3).

However, I believe there's another reason also that this section does not apply, which is that, first, the obligations under the lease are those that I have already specified, all of which arose prepetition, so that even to the extent that the release of the specific land where the obligation appears prepetition would not render that portion of the lease “unexpired”, to use the term in section 365(d)(3), the obligations that would remain are those set forth in paragraphs 8 and 10, and those are prepetition obligations as far as the assertion that any claims derive from them. See generally the discussion of 365(d)(3) in *In Re: Ames Department Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004).

For those reasons, I conclude that the respondents here have only asserted in the Kling-2 case prepetition general unsecured claims and, therefore, that those claims are subject to the bar date order and the discharge and, accordingly, may not be pursued at this time.

That leaves the respondents’ request that they be relieved of the bar date and be allowed to file, late, a proof of claim for such claims. If I were to grant that motion, the claims would be -- to the extent that they are determined by the

Louisiana court or another trier of fact to be valid -- those claims would be paid in full.

I have reviewed that request under Bankruptcy Rule 9006(b)(1), which permits a claimant to file a late proof of claim if the failure to submit a timely proof of claim was due to "excusable neglect." The burden of proving excusable neglect is on the respondents here. *In Re: R.H. Macy and Co.*, 161 B.R. 355, 360 (Bankr. S.D.N.Y. 1993).

The Supreme Court has developed a two-step test for determining whether a late filing was due to excusable neglect, in *Pioneer Investment Services, Co. v. Brunswick Associates, Limited Partnership*, 507 U.S. 380 (1993). First, the movant must show that its failure to file a timely claim constituted "neglect", as opposed to a knowing decision, neglect generally being attributed to a movant's inadvertence, mistake or carelessness. Id. at 387-88. After establishing neglect, as opposed to willfulness or knowledge of the bar date, and the failure to show why any unknowing basis for neglecting – and, I am sorry, and the failure to show any unknowing basis for neglecting it, the movant must show by a preponderance of the evidence that the neglect was "excusable." That analysis is to be undertaken on a case-by-case basis that is based on the particular facts of the case, although the court is to be guided by, and make the determination balancing, the following factors: (a) the danger of prejudice to the debtor, (b) the length of the

delay and whether or not it would impact the case, (c) the reason for the delay, in particular whether the delay was within the control of the movant, and (d) whether the movant acted in good faith. Id. at 395. However, "Inadvertence, ignorance of the rules or mistake construing the rules do not usually constitute excusable neglect." *Midland Cogeneration Venture LP v. Enron Corp.* (*In Re: Enron Corp.*), 419 F.3d 115, 126 (2d. Cir. 2005), citing *Pioneer*, 507 U.S. at 392.

In the *Midland* case, the Second Circuit has stated "We have taken a hard line in applying the *Pioneer* test. In a typical case, three of the *Pioneer* factors, the length of the delay, the danger of prejudice and the movant's good faith, usually weigh in favor of the party seeking the extension. We have noted, though, that we and other circuits have focused on the third factor, the reason for the delay, including whether it was within the reasonable control of the movant. And we cautioned that the equities will rarely, if ever, favor a party who fails to follow the clear dictates of a court rule, and that where the rule is entirely clear, we continue to expect that a party claiming excusable neglect will in the ordinary course lose under the *Pioneer* test." Id. at 122-23.

See also *In Re: Musicland Holding Corp.* 2006 Bankr. LEXIS 3315 at pages 10-11 (Bankr. S.D.N.Y. 2006), in which Chief Bankruptcy Judge Bernstein, citing *Midland*, stated that the Second Circuit focuses on the reason for the delay in

determining excusable neglect under *Pioneer* and that "the other factors are relevant only in close cases."

Here, I have considered the facts and conclude that there is not a basis for permitting the late filing of a proof of claim. First, it appears to me that the late filing of the claim was within the reasonable control of the respondents. They have argued that that they were confused by the fact that Texaco's plan paid creditors, including unsecured creditors, in full, and, further, that they felt that they might have had an administrative claim, instead of a prepetition general unsecured claim, as I have just determined.

Third, they've stated that they were confused by an earlier communication from Texaco that indicated that Texaco intended to treat its lessors essentially as if the bankruptcy had not happened.

However, I have reviewed the bar date notice, the plan, and that communication; and I conclude that a reasonable claimant would in making a similar review conclude that although unsecured claims, like administrative claims, would be paid in full, if there was any reasonable doubt as to whether the claim was administrative or unsecured it would have to file a proof of claim on a timely basis in order to have that claim be allowed as a general unsecured claim.

Moreover, I do not believe that the communication by Texaco would have reasonably led the respondents to think that

they would not have to comply with the subsequently received bar date notice. Rather, in order to be treated and paid in full, I believe it's clear from the notice that they would have to file the timely proof of claim. There's nothing in the wording of the notice, the bar date order, or the plan (which, frankly, follow the general form which is essentially boilerplate for these types of notices) that would have indicated otherwise.

Moreover, the respondents have a long history of noting claims and seeking to enforce claims for damages to the property caused by Texaco, including sending notices through representatives and lawyers prepetition. Therefore, it's safe to assume not only from that history as well as the fact that they were dealing with an oil and gas lease (where obviously there's a potential for at least contingent prepetition claims caused by the lessee's use of the property for its intended purposes) that they would have been aware that they would have had a unsecured prepetition claim, and, therefore, the failure to have filed such a claim was within their control.

Moreover, I don't believe the other factors suggest that this is a particularly close case, even in the -- if one were to weigh the other factors. The delay here is obviously substantial, over 22 years. Moreover, the delay follows the effective date of Texaco's plan and the closing of the case which occurred in 1991.

The respondents make the point that Texaco had, and

Chevron has, enough money to pay unsecured creditors in full and therefore there's no prejudice to the creditors. However, in a solvent Chapter 11 case, the fulcrum claim moves down to the equity holders. Here, Texaco emerged as a publicly held company from Chapter 11. The existence of this claim, which is a very large claim as asserted, if it existed, would have affected those holders. Moreover, Chevron purchased Texaco in reasonable reliance upon the bar date and the discharge, and the existence of this claim would, after that purchase and obviously well after the issuance of the discharge, prejudice it, as well.

So, while I believe that the respondents have acted in good faith here, I don't believe that they've established their burden, which is a heavy one given that I believe that the late filing was well within their control, to have the claim be permitted to be filed late. So, for those reasons, I will deny that request by the respondents.

The relief sought at this point seeks merely to enforce the discharge injunction and the bar date order, and I believe that's fully appropriate here for the reasons that I have stated. There's no issue here before me on any damages suffered by Texaco or Chevron -- the plaintiff here being quite candid that its goal is simply to stop the Kling-2 lawsuit from proceeding in violation of the Court's orders and the discharge.

So I will grant that relief and I request that, Mr. Bienenstock, you submit an order consistent with my ruling. You

do not have to settle that order on the respondents, but you should email it to them before you send it to me so that they would have a chance to review it to determine whether it's inconsistent with my ruling.

This has been a lengthy ruling. As I noted, the issues raised by the parties probably could serve as a law school exam. It was an oral ruling, and with oral rulings of this nature, I generally reserve the right to go over the transcript and edit it, not only for typos and mis-citations or misspellings of citations but also if I feel that I should have said something more elegantly or that I should have added something, I will do that. If I do that, I will file the corrected bench ruling and it will be a separate document in the case. It won't be the transcript anymore of my ruling. It will be the ruling. And I may do that here, given the length of this bench ruling; but the holding won't change. So, again, Mr. Bienenstock, you should submit an order consistent with the ruling.

MR. BIENENSTOCK: Thank you, Your Honor.

THE COURT: Okay. Thank you.

MR. STEFFES: Thank you, Your Honor.

THE COURT: Okay.

MS. KELLEHER: Your Honor?

THE COURT: Yes.

MS. KELLEHER: This is Leslie Kelleher for respondents

Kling, et al.

THE COURT: Yes.

MS. KELLEHER: We appreciate the thoughtfulness of your ruling but I would ask that we be allowed to submit supplemental briefs on the late filed issue as our understanding was that the opinion would deal primarily with the issue of administrative claims and Louisiana law and that the scope of the ruling would be with respect to what was discharged or not.

THE COURT: Well, the supplemental briefing covered that issue but as I -- I went back and read the transcript last night, as I took it, the parties put before me the 9006 issue. You can move under Rule 59, Bankruptcy Rule 9023, if you think there's something that should have been in the record on this that wasn't, but I think the whole thing was in front of me.

MS. KELLEHER: Thank you.

THE COURT: If I am wrong about that, you can make your motion, but at least you have the benefit of my thoughts on it even if I did misconstrue the posture of this and what you would have to show if you were going to prevail.

MS. KELLEHER: Thank you.

THE COURT: Okay. Thank you.

(This hearing concluded at 12:08:12.)

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CERTIFICATION

I, Linda Ferrara, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: June 1, 2010

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Signature of Approved Transcriber